NO. 86-1280 (4)

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE,

Petitioner,

vs.

JOHN HERRINGTON,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF ENERGY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NORTH CAROLINA, KENTUCKY, MISSISSIPPI, OHIO AND WEST VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI

Lacy H. Thornburg
Attorney General of North Carolina

H. Al Cole
Senior Deputy Attorney General

Daniel C. Oakley
Special Deputy Attorney General

Counsel for *Amici*

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

LIST OF *AMICI* STATES

STATE OF KENTUCKY

Honorable David L. Armstrong
Attorney General

STATE OF MISSISSIPPI

Honorable Edwin Lloyd Pittman,
Attorney General

Sidney J. Martin,
Deputy Attorney General

Lisa A. Spruill,
Special Assistant Attorney General

STATE OF NORTH CAROLINA

Honorable Lacy H. Thornburg,
Attorney General

H. Al Cole,
Senior Deputy Attorney General

Daniel C. Oakley,
Special Deputy Attorney General

STATE OF OHIO

Honorable Anthony J. Celebrezze, Jr.,
Attorney General

Sharon L. Sigler,
Assistant Attorney General

STATE OF WEST VIRGINIA

Honorable Charlie Brown,
Attorney General

QUESTIONS PRESENTED

1. Did the United States Department of Energy (DOE) violate the rights of the State of Tennessee under the Nuclear Waste Policy Act of 1982 (NWPA) in refusing to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a (first-of-its-kind) facility to process and store spent nuclear fuel generated by the nation's civilian nuclear power plants?

2. When does the NWPA require DOE to "consult and cooperate" with Tennessee officials in determining the suitability of sites in Tennessee for a nuclear waste storage facility?

(A) Does the NWPA require consultation and cooperation with Tennessee when DOE evaluates the suitability of areas in Tennessee for a nuclear waste storage facility?

(B) Or does the NWPA require consultation and cooperation only upon completion of DOE's planning process and after Congress authorizes site-specific, design-specific plans to construct the facility in Tennessee?

3. In light of the clear congressional mandate that DOE engage in "meaningful" consultation and cooperation with potential host states for proposed nuclear waste storage facilities, did the Court of Appeals misapply *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),, by deferring to a DOE interpretation of the NWPA that calls for consultation and cooperation with Tennessee only after congressional authorization of DOE's proposed site-specific, design-specific plan to construct a facility in Tennessee?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI STATES 1

ARGUMENT:

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONTRAVENES THE CONGRESSIONAL INTENT OF THE NUCLEAR WASTE POLICY ACT FOR BROAD AND MEANINGFUL STATE PARTICIPATION IN NUCLEAR WASTE FACILITY SITING PROCESSES AND DETERMINATIONS 3

SUMMARY OF ARGUMENT 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

PAGE

CASES CITED

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 3, 6, 7

Tennessee v. Herrington, 626 F.Supp. 1345 (M.D. Tenn. 1986) 6

Tennessee v. Herrington, 806 F.2d 642 (6th Cir. 1986) 3

STATUTES CITED

42 U.S.C. § 7401, *et seq* (1977) 6
42 U.S.C. § 10101, *et seq* (1982) 1
42 U.S.C. § 10132 2
42 U.S.C. § 10132 (b) (1) (A) 2
42 U.S.C. § 10136(a) 2
42 U.S.C. § 10137(b) 3, 5
42 U.S.C. § 10161 5
42 U.S.C. § 10161(h) 5, 6

MISCELLANEOUS

Cong. Rec. S. 15642 (December 20, 1982) 5

H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3792 4

NO. 86-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE,

Petitioner,

VS.

JOHN HERRINGTON,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF ENERGY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NORTH CAROLINA, KENTUCKY, MISSISSIPPI, OHIO AND WEST VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI STATES

The *amici* states, North Carolina, Kentucky, Mississippi, Ohio and West Virginia are interested in the review of this matter by the United States Supreme Court for several reasons. The Nuclear Waste Policy Act, 42 U.S.C. §§ 10101, *et seq* (1982) (NWPA, provides for a comprehensive approach to the management and storage of spent nuclear fuel and high-level radioactive waste in this country, and establishes as one of its focal themes a joint federal/state cooperative system. The individual *amici* states may be-

come integral players in that system, but additionally may experience direct effects from the transportation of wastes to and from the Monitored Retrievable Storage (MRS) facility, which is the subject of this matter. The *amici* states believe that the actions of the Department of Energy (DOE) with regard to determining the appropriateness of a MRS facility in our sister state of Tennessee are not in compliance with the spirit and letter of the NWPA, but equally as important to the *amici,* bode ominously for the future relationship between the states and DOE.[1] The instant case represents the first opportunity for the United States Supreme Court to interpret this important Act, and provides an excellent opportunity for the national ramifications of a narrowly-construed DOE policy of "consultation and cooperation" to be reviewed.

The *amici* states vigorously support the Petition for Writ of Certiorari of the State of Tennessee, and request this Court to exercise its judicial discretion to consider this matter, which involves an issue of obvious importance to the states and the citizens of the nation. The United States Supreme Court review of the interpretation of the NWPA made below is of vital interest to the *amici* states.

---

[1] The State of North Carolina is concerned about this future relationship between the states and DOE since it had two sites under consideration by DOE for possible development of a second repository under 42 U.S.C. § 10132, prior to suspension of that process. The State of Mississippi is equally concerned because the DOE is analyzing two sites within her borders for a nuclear waste repository. One Mississippi site has been designated as a "potentially acceptable site" [42 U.S.C. § 10136(a)] and nominated for site characterization by the Secretary of Energy [42 U.S.C. § 10132(b) (1) (A)], and the other site is under consideration for the second repository. The citizens of these States fully expect meaningful "consultation and cooperation."

ARGUMENT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONTRAVENES THE CONGRESSIONAL INTENT OF THE NUCLEAR WASTE POLICY ACT FOR BROAD AND MEANINGFUL STATE PARTICIPATION IN NUCLEAR WASTE FACILITY SITING PROCESSES AND DETERMINATIONS.

The State of Tennessee has brought forward its Petition for Writ of Certiorari for two reasons, with which the *amici* states are in complete agreement. The decision below, *Tennessee v. Herrington*, 806 F.2d 642 (6th Cir. 1986), (1) erroneously determines key provisions of the NWPA relating to the consultation and cooperation between the states and DOE in such a manner that the underpinnings of the contemplated cooperative mechanism may be seriously eroded, and, (2) erroneously applies the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to frustrate the Congressional intent of NWPA for full state participation.

The NWPA provisions relating to full and meaningful state participation in nuclear waste decision-making are clear, and are of vital importance to the continued viability of the Act and public acceptance of the determinations made thereunder. 42 U.S.C. § 10137(b) provides as follows:

> In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian

> tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

The crucial importance of this process to the entire decision-making matrix for nuclear waste management and storage cannot be understated. Reference to the Legislative History of the Act will bear this out.

> H.R. 3809 as amended by the Committee provides for states or tribes which are "hosts" to sites ied for repositories . . . clear rights and procedures for participation in decisions effecting the sites. . . .
>
> . . . Although the Department [of Energy] will have fundamental responsibilities under the Committee amendment to meet schedules, fully explore sites and develop timely and appropriate information for regulatory proceedings, its responsibilty to respond to and implement all reasonable suggestions of a state or tribe is also considered essential to the orderly implementation of the repository program.
>
> . . . The state or tribe on whose territory a site is located is considered to be the primary governmental participant in the repository program. H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3792, 3811-12.

In the instant case, the sections of NWPA involving the MRS facility, 42 U.S.C. § 10161, should not be read with a blind eye to the remainder of the Act. 42 U.S.C. § 10161(h) incorporates by reference the "consultation and cooperation" provisions of the Act, making them specifically applicable to the MRS siting process.[2] 42 U.S.C. § 10161(h) provides as follows:

> Any facilities authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

In the opinion of the Sixth Circuit Court of Appeals, the key word "authorized" is interpreted narrowly to defeat the utilization of the very procedures the section is designed to incorporate. 42 U.S.C. § 10137(b) clearly requires consultation and cooperation *as a part of* any DOE study within a State. To interpret "authorized" in such a manner as to prevent that occurrence is not a required construction of the Act, and leads to the anomalous result facing Tennessee at present. The proposal of the DOE regarding the MRS facility, which triggered the instant litigation, is a *fait accompli* without Tennessee participation. Tennessee has correctly pointed out that its input may be a virtual nullity once Congressional authorization is obtained. The District Court's determination that

---

[2] As the State of Tennessee noted in its Petition, Senator McClure commented on the addition of 42 U.S.C. § 10161(h) to the Act, directly, as follows: "Full state participation is provided for the MRS program in exactly the same way as it is provided in the case of repository sites." Cong. Rec. S. 15642 (December 20, 1982).

> the term 'authorized' in Section 141(h) must assume the meaning advanced by the State referring to a facility 'generally contemplated for study and development by the Secretary and presentation to Congress'.... *Tennessee v. Herrington,* 626 F.Supp. 1345, 1359 (M.D. Tenn., 1986),

is clearly the more appropriate resolution of any ambiguity in the meaning of "authorized." Neither DOE nor the majority opinion of the Sixth Circuit Court of Appeals made an attempt to read 42 U.S.C. § 10161(h) contextually with the remainder of the NWPA. This failure greatly concerns the *amici* states, which must now suspect that DOE will take the opportunity to narrowly interpret key provisions of the Act to the detriment of full State participation. This occurrence is even more likely if the opinion of the Sixth Circuit regarding the applicability of a *Chevron, supra,* analysis to the DOE's construction of NWPA is allowed to stand.

The *amici* states strenuously assert that the Circuit Court misapplied the principle of statutory construction as set forth in *Chevron, supra.* That case involved a review of EPA's air quality regulations regarding the use of the "bubble" concept around a polluting industry. The Court found that there was neither statutory language nor specific legislative intent to define the term "stationary source" as used in the Clear Air Act Amendments of 1977, 42 U.S.C. § 7401, *et seq* (1977); and that the use of the "bubble concept" was a reasonable policy choice for the agency to make, and was entitled to deference.

The instant case can be distinguished from *Chevron.* First, even though the NWPA is arguably ambiguous regarding the timing of MRS consultation and cooperation, the Congressional intent through the legislative history is evident. State participation throughout the

process is firmly established. In *Chevron,* Congress did not squarely address the definition of "stationary source" in either the statute or in the legislative history, but left that issue and other policy decisions to EPA.

Secondly, EPA's interpretation in *Chevron* came after the process of promulgating regulations (with notice and hearing), as opposed to DOE's unilateral decision not to consult and cooperate with Tennessee during the site screening and technology selection process. DOE's position appears to be a post hoc rationalization in response to a law suit rather than a policy considered and promulgated through "informed rulemaking."

The statute requires DOE to consult and cooperate with Tennessee (and other states, if under study for a MRS or repository pursuant to the NWPA). The Congressional intent provides that states should participate. The *Chevron* case was misapplied below, as there is a substantial difference between an agency policy developed through rulemaking and one developed to rationalize neglect of statutory responsibility.

SUMMARY OF ARGUMENT

The *amici* states support the granting of the State of Tennessee's Petition for Writ of Certiorari. This matter should be heard because of the significant questions brought forward concerning the Nuclear Waste Policy Act, an Act of extreme national importance. The interpretations of the Act at issue should be settled by this Court. The decision below renders meaningless a vital component of the Act's delicate mechanism for assuring that sound policy determinations are made--that of a full "consultation and cooperation" process between affected states and the Department of Energy. Further, the decision erroneously allows deference to the Department of Energy's

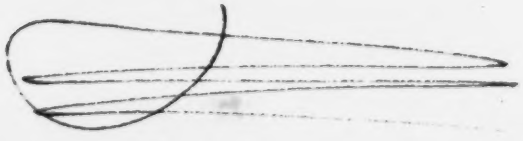
construction of the Act in a situation entirely divorced from more accepted notions of agency expertise.

CONCLUSION

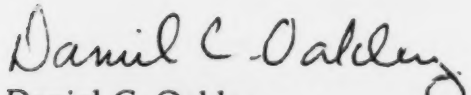
For the reasons set forth above, the *amici* states, North Carolina, Kentucky, Mississippi, Ohio and West Virginia, respectfully request, in support of the State of Tennessee, that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed November 25, 1986.

Respectfully submitted this the 7th day of March, 1987.

LACY H. THORNBURG
Attorney General



H. Al Cole
Senior Deputy Attorney General



Daniel C. Oakley
Special Deputy Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602-0629
919/733-5725

CERTIFICATE OF SERVICE

This is to certify that I have this day served the requisite number of copies of the foregoing BRIEF FOR THE STATES OF NORTH CAROLINA, KENTUCKY, MISSISSIPPI, OHIO AND WEST VIRGINIA, *AMICI CURIAE,* IN SUPPORT OF THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI on the attorneys of record by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

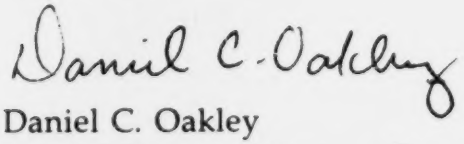
Mr. Frank J. Scanlon
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219-5025

Honorable John S. Herrington
Secretary of the U.S. Department of Energy
James Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Honorable Charles Fried
Solicitor General
United States Department of Justice
Constitution Avenue & 10th Street
Washington, D.C. 20530

This the 7th day of March, 1987.

LACY H. THORNBURG
Attorney General



Daniel C. Oakley
Special Deputy Attorney General
P. O. Box 629
Raleigh, N.C. 27602-0629
919/733-5725